Office - Supreme Court, U.S.
FILED
SEP 18 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS SHORTBULL,

Petitioner,

v.

STANLEY LOOKING ELK, et. al.,

Respondent,

No. 82-161

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Counsel of record and upon whom service is to be made:

DENNIS H. HILL, ESQ.
COSTELLO, PORTER, HILL,
NELSON, HEISTERKAMP, & BUSHNELL
ATTORNEYS FOR RESPONDENT
P.O. BOX 290
704 ST. JOE STREET
RAPID CITY, SOUTH DAKOTA
605-343-2410

QUESTIONS PRESENTED

(Same as Petitioner)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (i)

TABLE OF AUTHORITIES ..... (iii), (iv)

OPINIONS BELOW 2

GROUNDS FOR COURT'S JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4-7

SUMMARY OF ARGUMENT 7, 30

ARGUMENT 7, 31

CONCLUSION 32

TABLE OF AUTHORITIES

Cases: **Page**

Action v. Gannon,
450 F.2d 1227 (8th Cir. 1971) 29

Baer v. Baer,
450 F.Supp. 481, (N.D. Cal. 1978) 29

Cameron v. Brock,
473 F.2d 608 (6th Cir. 1973) 29

Chose v. McMasters,
573 F.2d 1011 (1978) 31

The Class Based Answers of 42 U.S.C. § 1985 (c): A Suggested Approach,
64 Minnesota L.Rev. 635, 642-44, (1980) 29

Duff v. Sherlock,
432 F.Supp. 423, 429 (E.D. Pa. 1977) 30

Glasgow v. City of Louisville,
528 F.2d 899, (6th Cir.) cert. denied, 423 U.S. 930,
96 S.Ct. 280, 46 L.Ed.2d 258 (1975) 29

Great American Federal Savings and Loan Association v. Novotny,
442 U.S. 366, 389, 6, 99 S.Ct. 2345,
60 L.Ed.2d 957 (1959) 29

Griffin v. Breckenridge,
403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2 338 (1971) 7, 29

Lesonan v. McCormick,
591 F.2d 605, 608, (10th Cir.) 1979 30

Marlowe v. Fisher Body,
489 F.2d 1057, (6th Cir.) 1973 29

McLellan v. Mississippi Power & Light Co.,
545 F.2d 919 (5th Cir.) 1977 30

TABLE OF AUTHORITIES, CONT.

Cases: **Page**

McNally v. Pulitzer Publishing Co.,
532 F.2d 69, 75 (8th Cir.), cert. denied, 429 U.S. 855,
97 S.Ct. 150, 50 L.Ed.2d 131 (1976) 30

Means v. Wilson,
522 F.2d, 833 (8th Cir. 1975),
cert. denied in 424 U.S. 958, 96 S.Ct. 1436 30

Oarchman v. Korman Corp.,
456 F.Supp. 730, 734 (E.D. Pa. 1978), cert. denied,
444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979) 30

Puentes v. Sullivan,
425 F.Supp. 249 (W.D. Tx. 1977) 29

Philadelphia Yearly Meeting of the
Religious Society of Friends v. Tate,
519 F.2d 1335 (3rd Cir. 1975) 29

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 9-30

Ward v. Connor,
657 F.2d 45 (4th Cir. 1981) 29

No. 82-161

IN THE

Supreme Court of the United States

October Term, 1982

THOMAS SHORTBULL,

Petitioner,

v.

STANLEY LOOKING ELK, et. al.*,

Respondents,

RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The respondent, Stanley Looking Elk, et. al., respectfully prays that the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 3, 1982, be denied.

---

*Respondents included:
Stanley Looking Elk, Elijah Whirlwind Horse*, James Mousseau, Ivan Bettelyoun, Marvin Amiotte, Gerald (Jump) Big Crow, Lyman Red Cloud, Delores Whitehead, Edgar High Whiteman, Gilbert Matthews, Dave Brewer, and Jerry Matthews.

*Deceased

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, together with the opinion of the United States District Court for the District of South Dakota, Western Division 507 F. Supp. 917 D.C.S.D. 1981 which it affirmed, appear in Appendices A and B of Petitioner's petition.

GROUNDS FOR COURT'S JURISDICTION

(Same as Petitioner)

STATUTORY PROVISIONS INVOLVED

(Same as Petitioner)

STATEMENT OF THE CASE

Petitioner was born at Igloo, South Dakota, which town is not on the Pine Ridge Reservation, South Dakota. His father is an enrolled member of the Oglala Sioux Tribe. Petitioner lived at Igloo, South Dakota with his parents until they moved to Denver, Colorado, where Petitioner attended Kindergarten. He lived on the Pine Ridge Reservation during first and second grade and then moved to Belvidere, South Dakota, a city off the Pine Ridge Reservation. He again lived at Igloo, South Dakota, with his parents from fourth grade through twelfth grade. His father and mother did not vote in Tribal elections. His father was a civilian painter at the Ordinance Department at Igloo, South Dakota.

Petitioner established his home on the Pine Ridge Reservation June 1, 1975, and has lived there ever since.

Petitioner's mother had submitted his name for enrollment at the Rosebud Sioux Tribe in 1973.

He then relinquished his right as a member of the Rosebud Sioux Tribe on March 28, 1974. His mother also submitted his application for membership in the Oglala Sioux Tribe in 1963.

The case arises out of a dispute concerning the primary and general elections for the office of Tribal President of the Oglala Sioux Tribe. Petitioner charges that a conspiracy on the part of the Respondents in violation of 42 U.S.C. § 1985 (3) led to his name not being placed on the ballot for the primary election to be held February 5, 1980. To fully understand Petitioner's allegations it is necessary to trace the facts leading up to the tribal elections.

As of April 1, 1935, the tribe established an official census of members. The Bureau of Indian Affairs has an established policy of classifying the members of the Oglala Sioux Tribe as "A" alloted (those to whom 160 acres of land were awarded pre 1935), and "U" unalloted (those that were not given land), and for those born of members but off the reservation at the time of birth and nonresidents the classification "NE". These terms have been used by the Oglala Sioux Tribe although the membership rolls have not been expanded by enrollment action on NE's until 1982 (beyond this record). The tribe's constitution provides:

> Section 1 — The membership of the Oglala Sioux Tribe shall consist as follows:
>
> (a) All persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935...
>
> (b) All children born to any member of the tribe who is a resident at the time of birth of said children.

In 1979 the Oglala Sioux Tribe adopted resolution 79-08 which called for the creation of a tribal enrollment committee which committee had not been established when on January 9, 1980, Petitioner Thomas Shortbull filed his nominating petitions for the office of Tribal President. [1] Even though Petitioner's petitions apparently contained a sufficient number of names to meet the tribe's requirements for a presidential candidate, the tribal election board failed to take any action in regard to Petitioner's nominating peti-

---

NOTE 1: The ordinance was implemented in 1982. The application for membership of Petitioner, along with the other NE's, was acted upon pursuant to the ordinance. Petitioner's application for membership was approved and presumably if Petitioner would run for office at this time and met all the candidacy requirements his petition for candidacy would be favorably acted upon.

tions after receipt of them. The reason for the board's refusal to certify Petitioner as a candidate was that he is not an enrolled member of the Oglala Sioux Tribe, a requirement of that office. After several tribal meetings and pleas by Petitioner that he be certified as a candidate,[2] on January 24, 1980, the Tribal Council adopted a resolution directing the tribal election board to certify Petitioner as a candidate for the upcoming tribal election. However, on January 29, 1980, a resolution was adopted by the Tribal Council which provided for the "Tribal Council body to uphold the Constitution and By Laws and Election Ordinance, and also uphold any decision of the Election Board."

On January 24, 1980, H. Clyde Red Shirt, chief judge of the Tribal Court, ordered the Election Board to certify Plaintiff as a candidate and place his name on the February 5 primary election ballot. This decision was appealed January 28, 1980, to the Tribal Appeals Court, and Judge Red Shirt's order was suspended by the Appeals Court. On February 1, 1980, irrespective of the action of the Appeals Court, Red Shirt held several tribal officials in contempt for failure to implement his order regarding the placement of the Plaintiff's name on the ballot. He ordered these officials arrested and they were placed in jail. On this same day, the Tribal Council removed Judge Red Shirt from office and Judge Delores Whitehead quashed his orders of arrest. Furthermore, the Oglala Sioux Tribal Appeals Court stayed ex-

NOTE 2: Petitioner claims the Tribal Council on January 9, 1980, passed a motion to allow NE's to vote and run for office in the Primary Election. On January 18, 1980, this action was rescinded by the council. On January 24, 1980, in response to Judge Red Shirt's order the Council took action to certify Petitioner's candidacy. On January 29, 1980, the Council finally resolved to follow the Constitution and By-Laws and "support the decisions of the election board." In the meantime Petitioner failed to appeal the decision of the appeals board as required by the election ordinance.

ecution of Red Shirt's orders of February 1, 1980. Also, on February 1, 1980, the election board notified Plaintiff that he was not eligible to run for tribal president because he was listed on the tribal records as an N.E.

On February 4, 1980, Red Shirt ruled that he was still Chief Judge and had arrest warrants re-issued for those persons he had held in contempt of court. He also ordered postponement of the February 5 primary election. On this same day, Judge Whitehead quashed Red Shirt's arrest warrants and ordered that Red Shirt's contempt citations of February 1 be purged. The primary election was held on February 5 as scheduled without Petitoner's name on the ballot.

Petitioner subsequently filed a suit in this Court on February 11, 1980. That suit, which named various tribal officials as defendants, was brought under 42 U.S.C. § 1985 (3) and 42 U.S.C. § 1983. In it Petitioner asked for damages and for the Court to declare the acts of the Respondents unlawful and to enjoin Respondents from taking such action in the future. Petitioner subsequently filed a motion for a temporary restraining order attempting to enjoin the tribal general election which was scheduled for March 11, 1980.

On March 7, 1980, the Honorable Donald J. Porter denied Petitioner's motion for a temporary restraining order and dismissed Petitioner's complaint. Judge Porter's dismissal of the complaint in the earlier case was primarily based on two factors. First, Petitioner had failed to allege that the Defendants' alleged illegal acts were carried out in order to further their own cause. Secondly, the complaint was dismissed because Petitioner had failed to show he had exhausted his tribal remedies. Petitioner filed the complaint in the instant action of March 17, 1980.

SUMMARY OF ARGUMENT (QUESTION 2)

(Respondent will follow Petitioner's order of argument.)

The tribe may discriminate against non-enrollees (N.E.'s) barring them from running for the office of tribal president without violating the standards of Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

ARGUMENT (QUESTION 2)

This case does not revolve around *when* an Indian becomes a member of the Oglala Sioux Tribe, but *how*. The tribe has an official census roll of April 1, 1935. Thereafter admission to the tribal membership is by tribal action. The tribe has had an enrollment clerk and many additions to the rolls were made from 1935 to the commencement of this action. The council established a tribal enrollment committee under ordinance 79-08 for the expressed purpose of membership considerations in cases of residency questions. Petitioner admits he has made application to the tribe under this ordinance and now is a duly enrolled member. Petitioner alleges from 1935 to the commencement of this action there are others who have been born to enrolled members but have been denied enrollment to the tribe as he, and others like him, were born at a location without the boundaries of the Pine Ridge Indian Reservation, the Oglala Sioux Tribe's traditional place of residence. These persons are presumed presently dealt with as petitioner was recently dealt with. The tribe's constitution requires candidates for president of the tribe to be enrolled members. Petitioner admits he was not so qualified although he argues he is born of an enrolled member but

claims his interpretation of "residency", that of the "common law," should be adopted and imposed upon the Council of the Oglala Sioux Tribe .

The Petitioner has based his complaint against the Respondents under 42 U.S.C. § 1985 (3). Respondent's position is that 42 U.S.C. § 1985 does not apply to Indians as it does not specifically state it is applicable to Indians and in the absence of such specific statement such inference may not be implied. This Court stated in Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978) the Indian Civil Rights Act does not confer jurisdiction in Federal Courts for claims of Indians against Tribal Governments, and we quote as follows:

"[1, 2] Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832); see *United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 717, 42 L.Ed.2d 706 (1975); F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382, 6 S.Ct. 1109, 1112-1113, 30 L.Ed. 228 (1886). See *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). They have power to make their own substantive law in internal matters, see *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897) (membership); *Jones v. Meehan*, 175 U.S. 1, 29, 20 S.Ct. 1, 12, 44 L.Ed. 49 (1899) (inheritance rules); *United States v. Quiver*, 241 U.S. 602, 36 S.Ct. 699, 60 L.Ed. 1176 (1916) (domestic relations), and to enforce that law in their own forums, see *e.g.*, *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959)."

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196 (1896), this Court held that the Fifth Amendment did not "operat[e] upon" "the powers of local self-government enjoyed" by the tribes. *Id.*, at 384, 16 S.Ct. at 384. In ensuing years the lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment. [7]"

7. See, *e.g.*, *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533, (CA8 1967) (Due Process Clause of Fourteenth Amendment); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (CA10 1959) (freedom of religion under First and Fourteenth Amendments); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (CA8 1958), cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959) (Fourteenth Amendment). See also *Martinez v. Sourthern Ute Tribe*, 249 F.2d 915, 919 (CA10 1957), cert. denied, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958) (applying *Talton* to Fifth Amendment Due Process claim); *Groundhog v. Keeler*, 442 F.2d 674, 678 (CA10 1971). But see *Colliflower v. Garland*, 342 F.2d 369 (CA9 1965), and *Settler v. Yakima Tribal Court*, 419 F.2d 486 (CA9 1969), cert. denied, 398 U.S. 903, 90 S.Ct. 1690, 26 L.Ed.2d 61 (1970), both holding that where a tribal court was so pervasively regulated by a federal agency that it was in effect a federal instrumentality, a writ of habeas corpus would lie to a person detained by that court in violation of the Constitution.

The line of authority growing out of *Talton*, while exempting Indian tribes from constitutional provisions addressed specifically to State or Federal governments, of course does not relieve State and Federal Governments of their obligations to individual Indians under these provisions.

"[3] As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. *Ibid.* See, *e.g.*, *United States v. Kagama*, *supra*, 118 U.S., at 379-381, 383-384, 6 S.Ct., at 1111-1112, 1113-1114; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305-307, 23 S.Ct. 115, 119, 47 L.Ed. 183 (1902). Title I of the ICRA, 25, U.S.C. §§ 1301-1303, represents an exercise of that authority. In 25 U.S.C. § 1302, Congress acted to modify the effect of *Talton* and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained iin the Bill of Rights and the Fourteenth Amendment.[8] In 25 U.S.C. § 1303, the only remedial provision expressly supplied by Congress, the "privilege of the writ of habeas corpus" is made "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."***"

8. Section 1302 in its entirety provides that:

"No Indian tribe in exercising powers of self-government shall —

"(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

"(2) violate the right of the people to be secure in their persons, houses, papers, and effects aginst unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

"(3) subject any person for the same offense to be twice put in jeopardy;

"(4) compel any person in any criminal case to be a witness against himself;

"(5) take any private property for a public use without just compensations;

III

[4] "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 2620-2621, 53 L.Ed.2d 667 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of

> "(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
>
> "(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
>
> "(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> "(9) pass any bill of attainder or ex post facto law; or
>
> "(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."

Section 1301 is a definitional section, which provides, *inter alia*, that the "powers of self-government" shall include "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed..." 25 U.S.C. § 1301(2).

Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co., supra,* 309 U.S., at 512, 60 S.Ct. at 656.

It is settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed.' " *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976), quoting, *United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 1502,, 23 L.Ed.2d 52 (1969). Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. *** In the absence here of any unequivocal expression of contrary intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit."

IV

[5] "As an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit. See *Puyallup Tribe, Inc. v. Washington Department of Game, supra,* 433 U.S., at 171-172, 97 S.Ct., at 2620-2621; cf. *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). We must therefore determine whether the cause of action for declaratory and injunctive relief asserted here by respondents, though not expressly authorized by the statute, is nonetheless implicit in its terms."

[6] "In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have

established for themselves," *Fisher v. District Court*, 424 U.S. 382, 387-388, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976), may "undermine the authority of the tribal cour[t]...and hence...infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 385 U.S., at 223, 79 S.Ct., at 272.[9] *A fortiori*, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one this case, cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in §§ 1303, a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. Cf. *Antoine v. Washington*, 420 U.S. 194, 199-200, 95 S.Ct. 944, 948, 43 L.Ed.2d 129, (1975); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912)."

9. In *Fisher*, we held that a state court did not have jurisdiction over an adoption proceeding in which all parties were members of an Indian tribe and residents of the reservation. Rejecting the mother's argument that denying her access to the state courts constituted an impermissible racial discrimination, we reasoned: "The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law...[E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S., at 390-391, 96 S.Ct., at 948.

In *Williams v. Lee*, we held that a non-Indian merchant could not invoke the jurisdiction of a state court to collect a debt owed by a reservation Indian and aris-

[7] With these considerations of "Indian sovereignty...[as] a backdrop against which the applicable...federal statut[e] must be read," *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172, 93 S 1257, 1262, 36 L.Ed.2d 129 (1973), we turn now to those factors of more general relevance in determining whether a cause of action is implicit in a statute not expressly providing one. See *Cort v. Ash*, 442 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).[10] We note at the outset that a central purpose of the ICRA and in particular of Title I was to "secur[e] for

ing out of the merchant's activities on the reservation, but instead must seek relief exclusively through tribal remedies.

10. "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39, [36 S.Ct. 482, 60 L.Ed. 874] (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g.*, *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g.*, *Amtrak, supra; Securities Investor Protection Corp. v. Barbour*, 421 U.S. 512, 423, 95 S.Ct. 1733, 44 L.Ed.2d 262 (1975); *Calhoon v. Harvey*, 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964). And, finally, is the cause of action one traditionally relegated to state [or tribal] law, in an area basically the concern of the States [or tribes], so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort v. Ash*, 422 U.S., at 78, 95 S.Ct., at 2088.

See generally Note, Implication of Civil Remedies Under the Indian Civil Rights Act, 75 Mich.L.Rev. 210 (1976).

the American Indian the broad constitutional rights afforded to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments." S.Rep. No. 841, 90th Cong., 1st Sess., 5-6 (1967). There is thus no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916); see *Cort v. Ash, supra*, 422 U.S., at 78, 95 S.Ct., at 2087. Moreover, we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms. See, *e.g.*, *Jones V. Alfred H. Mayer Co*, 392 U.S. 409, 414 n. 13, 88 S.Ct. 2186, 2189, 20 L.Ed.2d 1189 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S.229, 238-240, 90 S.Ct. 400, 405-406, 24 L.Ed.2d 386 (1969). See also *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). These precedents, however, are simply not dispositive here. Not only are we unpersuaded that a judicially sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one. See *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974); *Cort v. Ash, supra*."

A

[8] "Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-

government." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S 2483, 41 L.Ed.2d 290 (1974); see *Fisher v. District Court*, 424 U.S., at 391, 96 S.Ct. at 948.[11] This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself. Section 1302, rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed,[12] selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal

11. One month before passage of the ICRA, President Johnson had urged its enactment as part of a legislative and administrative program with the overall goal of furthering "self-determination," "self-help," and "self-development" of Indian tribes. See 114 Cong.Rec. 5518, 5520 (1968).

12. Exploratory hearings which led to the ICRA commenced in 1961 before the Subcommittee on Constitutional Rights of the Senate Judicial Committee. In 1964, Senator Ervin, Chairman of the Subcommittee, introduced S. 3041-3048, 88th Cong., 2d Sess., on which no hearings were had. The bills were reintroduced in the 89th Congress as S. 961-968 and were the subject of extensive hearings by the Subcommittee. Hearings on S. 961-968 and S.J.Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess, (1965) (hereinafter cited as 1965 Hearings.)

S. 961 would have extended to tribal governments all constitutional provisions applicable to the Federal Government. After criticism of this proposal at the hearings, Congress instead adopted the approach found in a substitute bill submitted by the Interior Department, reprinted in 1965 Hearings 318 which, with some changes in wording, was enacted into law as 25 U.S.C. §§ 1302-1303. See also n. 1, *supra*.

governments.[13] See n. 8, *supra*. Thus, for example, the statute does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases, cf. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).[14]"

"The other Titles of the ICRA also manifest a congressional purpose to protect tribal sovereignty from undue in-

13. See, *e.g.*, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Constitutional Rights of the American Indian; Summary Report of Hearings and Investigations Pursuant to S.Res. 194, 89th Cong., 2d Sess., 8-11, 25 (Comm. Print 1966); 1965 Hearings 17, 21, 50 (statements of Solicitor of the Dept. of the Interior); *id.*, at 65 (statement of Arthur Lazarus, Jr., General Counsel for the Association of American Indian Affairs).

14. The provisions of § 1302, set forth fully in n. 8 *supra*, differ in language and in substance in many other respects from those contained in the constitutional provisions on which they were modeled. The provisions of the Second and Third Amendments, in addition to those of the Seventh Amendment, were ommitted entirely. The provision here at issue, § 1302(8), differs from the constitutional Equal Protection Clause in that it guarantees "the equal protection of *its* [the tribe's] laws," rather than of "*the* laws." Moreover, § 1302(7), which prohibits cruel or unusual punishments and excessive bails, sets an absolute limit of six months' imprisonment and a $500 fine on penalties which a tribe may impose. Finally, while most of the guarantees of the Fifth Amendment were extended to tribal actions, it is interesting to note that § 1302 does not require tribal criminal prosecutions to be intiated by grand jury indictment, which was the requirement of the Fifth Amendment specifically at issue and found inapplicable to tribes in *Talton v. Mayes*, discussed, *supra*, at 1676.

terference. For instance, Title III, 25 U.S.C. § 1321-1326, hailed by some of the ICRA's supporters as the most important part of the Act,[15] provides that States may not assume civil or criminal jurisdiction over "Indian country" without the prior consent of the tribe, thereby abrogating prior law to the contrary.[16] Other Titles of the ICRA provide for strengthening certain tribal courts through training of Indian judges,[17] and for minimizing interference by the Federal Bureau of Indian Affairs in tribal ligation.[18]"

15. See, *e.g.*, Cong.Rec. 9596 (1968) (remarks of Rep. Meeds); Hearings on H.R. 15419 before the Subcommittee on Indian Affairs of the House Committee on Interior & Insular Affairs, 90th Cong., 2d Sess., 108 (1968) (hereinafter cited as House Hearings). See also 1965 Hearings 198 (remarks of Executive Director, National Congress of American Indians).

16. In 25 U.S.C. § 1323(b), Congress expressly repealed § 7 of the Act of Aug. 15, 1953, 67 Stat. 590, which had authorized States to assume criminal and civil juridiction over reservations without tribal consent.

17. Title II of the ICRA provides, *inter alia*, "for the establishing of educational classes for the training of judges of courts of Indian offenses." 25 U.S.C. § 1311(4). Courts of Indian offenses were created by the Federal Bureau of Indian Affairs to administer criminal justice for those tribes lacking their own criminal courts. See generally W. Hagan, Indian Police and Judges 104-125 (1966).

18. Under 25 U.S.C. § 81, the Secretary of the Interior and the Commissioner of Indian Affairs are generally required to approve any contract made between a tribe and an attorney. At the exploratory hearings, see n. 12, *supra*, it became apparent that the Interior

[9] "Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, see *supra,* at 1677-1678, but it would also impose serious financial burdens on already "financially disadvantaged" tribes. Subcommittee on Constitutional Rights, Senate Judiciary Committee, Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations Pursuant to S.Res. 194, 89th Cong., 2d Sess., 12 (Comm. Print 1966) (hereinafter cited as Summary Report)[19]"

Department had engaged in inordinate delays in approving such contracts and had thereby hindered the tribes in defending and asserting their legal right. See, *e.g.,* Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S.Res.53, 87th Cong., 1st Sess., 211 (1961) (hereinafter cited as 1961 Hearings); *id.,* at 290, 341, 410. Title V of the ICRA, 25 U.S.C. § 1331, provides that the Department must act on applications for approval of attorney contracts within 90 days of their submission or the application will be deemed to have been granted.

19. The cost of civil ligation in federal district courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. See generally 1 American Indian Policy Review Commission, Final Report 160-166 (1977); M. Price, Law and the American Indian 154-160, (1973). And, as became apparent in the congressional hearings on the ICRA, many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of

[10] "Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these froums are obliged to apply.[20] Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.[21] See, *e.g.*,

defending federal lawsuits. See, *e.g.* 1965 Hearings 131, 157; Summary Report 1679; House Hearings 69 (remarks of the Governor of the San Felipe Pueblo).

20. Prior to passage of the ICRA, Congress made detailed inquiries into the extent to which tribal constitutions incorporated "Bill of Rights" guarantees, and the degree to which the tribal provisions differed from those found in the Constitution. See, *e.g.*, 1961 Hearings 121, 166, 359; Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary pursuant to S.Res.58, 88th Cong., 1st Sess., 823 (1963). Both Senator Ervin, the ICRA's chief sponsor, and President Johnson, in urging passage of the Act, explained the need for Title I on the ground that few tribal constitutions included provisions of the Bill of Rights. See House Hearings 131 (remarks of Sen. Ervin); 114 Cong.Rec. 5520 (1968) (message from the President).

21. There are 287 tribal governments in operation in the United States, of which 117 had operating tribal courts in 1976. 1 American Indian Policy Review Commission, *supra*, n. 19, at 5, 163. In 1973 these courts handled approximately 70,000 cases. *Id.*, at 163-164. Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some

Fisher v. District Court, 424 U.S.____382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). See also *Ex parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). Non judicial tribal institutions have also been recognized as competent law-applying bodies. See *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).[22] Under these circumstances, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas corpus relief."

B

[11] "Our reluctance is strongly reinforced by the specific legislative history underlying 25 U.S.C. § 1303. This

circumstances as entitled to full faith and credit in other courts. See, *e.g.*, *United States ex rel. Mackey v. Coxe*, 18 How. 100, 15 L.Ed. 299 (1856); *Standley v. Roberts*, 59 F. 836, 845 (CA8 1894), appeal dismissed, 17 S.Ct. 999, 41 L.Ed. 1177 (1896).

22. By the terms of its Constitution, adopted in 1935 and approved by the Secretary of the Interior in accordance with the Indian Reorganization Act of 1934,, 25 U.S.C. § 476, judicial authority in the Santa Clara Pueblo is vested in its tribal council.

Many tribal constitutions adopted pursuant to 25 U.S.C. § 476, though not that of the Santa Clara Pueblo, include provisions requiring that tribal ordinances not be given effect until the Department of the Interior gives its approval. See 1 American Indian Policy Review Commission, *supra* n. 19, at 187-188; 1961 Hearings 95. In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.

history, extending over more than three years,[23] indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitious interference in the affairs of the Indian people." Summary Report 11."

"In settling on habeas corpus as the exclusive means for federal-court review of tribal criminal proceedings, Congress opted for a less intrusive review mechanism than had been initially proposed. Originally, the legislation would have authorized *de novo* review in federal court of all convictions obtained in tribal courts.[24] At hearings held on the proposed legislation in 1965, however, it became clear that even those in agreement with the general thrust of the review provision — to provide some form of judicial review of criminal proceedings in tribal courts — believed that *de novo* review would impose unmanageable financial burdens on tribal governments and needlessly displace tribal courts. See *id.*, at 12; 1965 Hearings 22-23, 157, 162, 341-342. Moreover, tribal representatives argued that *de novo* review would "deprive the tribal court of all jurisdiction in the event of an appeal, thus having a harmful effect upon law enforcement within the reservation," and urged instead that "decisions of tribal courts... be reviewed in the U.S. district courts upon petition for a writ of habeas corpus." *Id.*, at 79. After considering numerous alternatives for review of tribal convictions, Congress apparently decided

23. See n. 12, *supra*. Although extensive hearings on the ICRA were held in the Senate, see *ibid.*, House consideration was extremely abbreviated. See House Hearings, *supra*; 114 Cong.Rec. 9614-9615 (1968) (remarks of Rep. Aspinall).

24. S. 692, 89th Cong., 1st Sess. (1965), reprinted in 1965 Hearings 6-7. See n. 12, *supra*.

that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments."

"Similarly, and of more direct import the issue in this case, Congress considered and rejected proposals for federal review of alleged violations of the Act arising in a civil context. As initially introduced, the Act would have required the Attorney General to "receive and investigate" complaints relating to deprivations of an Indian's statutory or constitutional rights, and to bring "such criminal or other action as he deems appropriate to vindicate and secure such right to such Indian."[25] Not withstanding the screening effect this proposal would have had on frivolous or vexatious lawsuits, it was bitterly opposed by several tribes. The Crow Tribe representative stated:

> This [bill] would in effect subject the tribal sovereignty of self-government to the Federal government...[B]y its broad terms [it] would allow the Attorney General to bring any kind of action as he deems appropriate. By this bill, any time a member of the tribe would not be satisfied with an action by the [tribal] council, it would allow them [*sic*] to file a complaint with the Attorney General and subject the tribe to a multitude of investigations and threat of court action." 1965 Hearings 235 (statement of Mr. Real Bird)."

"In a similar vein, the Mescalero Apache Tribal Council argued that "[i]f the perpetually dissatisfied individual Indian were to be armed with legislation such as proposed in [this bill] he could disrupt the whole of tribal government." *Id.*, at 343. In response, this provision for suit by the

25. S. 963, 89th Cong., 1st Sess. (1965). See n. 12, *supra*.

Attorney General was completely eliminated from the ICRA. At the same time, Congress rejected a substitute proposed by the Interior Department that would have authorized the Department to adjudicate civil complaints concerning tribal actions, with review in the district courts available from final decisions of the agency.[26]"

"__Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302. Although the only Committee Report on the ICRA in its final form, S.Rep. No. 841,

26. The Interior Department substitute, reprinted in 1965 Hearings 318, provided in relevant part:

"Any action, other than a criminal action, taken by an Indian tribal government which deprives any American Indian of a right or freedom and protected by this Act may be reviewd by the Secretary of the Interior upon his own motion or upon the request of said Indian. If the Secretary determines that said Indian has been deprived of any such right or freedom, he shall require the Indian tribal government to take such corrective action as he deems necessary. Any final decision of the Secretary may be reviewed by the United States district court in the district in which the action arose and such court shall have jurisdiction thereof.

In urging Congress to adopt this proposal, the Solicitor of Interior specifically suggested that "Congress has the power to give to the courts the jurisdiction that they would require to review the actions of an Indian tribal court," and that the substitute bill which the Department proposed "would actually confer on the district courts the jurisdiction they require to consider these problems." *Id.*, 23-24. Congress' failure to adopt this provision is noteworthy particularly because it did adopt the other portion of the Interior substitute bill, which led to the current version of §§ 1302 and 1303. See n. 12, *supra*.

90th Cong. 1st Sess. (1967), sheds little additional light on this question, it would hardly support a contrary conclusion.[27] Indeed its description of the purpose of Title I,[28] as

27. Respondents rely most heavily on a rambling passage in the Report discussing *Talton v. Mayes* and its progeny, see n. 7, *supra*, some of which arose in a civil context. S.Rep. No. 841, at 8-11. Although there is some language suggesting Congress was concerned about the unavailability of relief in federal court, the Report nowhere states that Title I would be enforceable in a cause of action for declaratory or injunctive relief, and the cited passage is fully consistent with the conclusion that Congress intended only to modify the substance of the law applicable to Indian tribes, and to allow enforcement in federal court through habeas corpus. The Report itself characterized the import of its discussion as follows:

"These cases illustrate the continued denial of specific constitutional guarantees to litigants in tribal court proceedings, on the ground that the tribal courts are quasi-sovereign entities to which general provisions in the Constitution do not apply." *Id.*, at 10.

28. The Report states: "The purpose of Title I is to protect individual Indians from arbitrary and unjust actions by tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government." *Id.*, at 6. It explains further that "[i]t is hoped that Title II [25 U.S.C. § 1311], requiring the Secretary of the Interior to recommend a model code [to govern the adminstration of justice] for all Indian tribes, will implement the effect of Title I." *Ibid.*, (Although § 1311 by its terms refers only to courts of Indian offenses, see n. 17, *supra*, the Senate Report make clear that the code is intended to serve as a model for use in all tribal courts. S.Rep. No. 841, *supra*, at 6, 11.) Thus, it appears that the Committee viewed § 1302 as enforceable only on habeas corpus and in tribal forums.

well as the floor debates on the bill,[29] indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303.[30] These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303."

29. Senator Ervin described the model code provisions of Title II, see n. 28, *supra*, as "the proper vehicle by which the objectives" of Title I should be achieved. 113 Cong.Rec. 13475 (1967). And Congressman Reifel, one of the ICRA's chief supporters in the House, explained that "by providing for a writ of habeas corpus from the Federal court, the bill would assure effective enforcement of these fundamental rights." 114 Cong.Rec. 9553 (1968).

30. Only a few tribes had an opportunity to comment on the ICRA in its final form, since the House held only one day of hearings on the legislation. See n. 23, *supra*. The Pueblos of New Mexico, testifying in opposition to the provisions of Title I, argued that the habeas corpus provision of § 1303 "opens an avenue through which Federal courts, lacking knowledge of our traditional values, customs, and laws, could review and offset the decisions of our tribal councils." House Hearings 37. It is inconceivable that, had they understood the bill impliedly to authorize other actions, they would have remained silent, as they did, concerning this possibility. It would hardly be consistent with "[t]he overriding duty of our Federal Government to deal fairly with Indians," *Morton v. Ruiz*, 415 U.S. 199, 236, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974), lightly to imply a cause of action on which the tribes had no prior opportunity to present their views.

V

[12] "As the bill's chief sponsor, Senator Ervin, [31] commented in urging its passage, the ICRA "should not be considered as the final solution to the many serious constitutional problems facing the American Indian." 113 Cong.Rec. 13473 (1967). Although Congress explored the extent to which tribes were adhering to constitutional norms in both civil and criminal contexts, its legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice. See *ibid.*, quoting Summary Report 24. In light of this finding, and given Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose at this stage to provide for federal review only in habeas corpus proceedings."

"By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particulary those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts. Our relations with the Indian tribes have "always been...anomalous...and of a complex character." *United States v. Kagama*, 118 U.S., at 381, 6 S.Ct., at 1112. Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes under Art. III, *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831), we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and

31. See generally Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act, 9 Harv.J.Legis. 557, 574-602, 603 (1972).

state governments. See *Elk v. Wilkins*, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643, (1884). As is suggested by the District Court's opinion in this case, see *supra*, at 1674-1675, efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity.[32]"

[13] "As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903). Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers."

32. A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. See *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76, 27 S.Ct. 29, 51 L.Ed. 96 (1906). Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.

Since there is no reference in 42 U.S.C. § 1985 (3) to Indians under the interpretive rules of this court or expressed in Santa Clara Pueblo v. Martinez, supra, it follows 42 U.S.C. § 1985 (3) does not rest jurisdiction in the federal district courts to hear complaints of Indians vs. Indians.

For the purpose of addressing the Petitioner's arguments, even if 42 U.S.C. § 1985 (3) were found applicable in this case, which interpretation Respondent denies, the argument of Petitioner fails as Petitioner cannot satisfy the requirements laid down in the case Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). The lower court found NE's (non-enrolled) is not a class and therefore could not present a class based claim.

The decision herein appealed from refers to cases interpreting the Griffin decision;

Great American Federal Savings and Loan Association vs. Novotny, 442 U.S. 366, 389, 6, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1959).

The Class Based Answers of 42 U.S.C. § 1985 (c): A Suggested Approach, 64, Minnesota L.Rev. 635, 642-44 (1980).

Ward v. Connor 657 F. 2d 45 (4th Cir. 1981)

Marlowe v. Fisher Body 489 F. 2d 1057 (6th Cir. 1973)

Action v. Gannon 450 F. 2d 1227 (8th Cir. 1971)

Baer v. Baer 450 F. Supp. 481 (N.D. Cal. 1978)

Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F. 2d 1335, (3rd Cir. 1975)

Glasgow v. City of Louisville, 528 F.2d 899, (6th Cir.), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975).

Cameron v. Brock 473 F.2d 608 (6th Cir. 1973)

Puentes v. Sullivan 425 F. Supp. 249 (W.D. Tex. 1977)

Harrison v. Brooks 519 F. 2d 1358, 1359-60 (1st Cir. 1975)

and distinguished this case from Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. denied in 424 U.S. 958, 96 S.Ct. 1456, on the basis that NE's as they appear in this case, do not present a "class based claim." The court held "class based animus" does not include personal animus:

Duff v. Sherlock 432 F. Supp. 423, 429 (E.D. Pa. 1977)

Lesonan v. McCormick, 591 F.2d 605, 608 (10th Cir.) 1979.

McNally v. Pulitzer Publishing Co., 532 F.2d 69, 75 (8th Cir.), cert. denied, 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976).

McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977).

Oarchman v. Korman Corp., 456 F. Supp. 730, 734 (E.D. Pa. 1978), cert. denied, 444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979).

then the court follows Santa Clara Pueblo v. Martinez, supra, in holding a tribe has an important interest in setting the standards for who may vote and run in tribal elections. An Indian becomes an enrolled member of the tribe upon admittance by the tribe to the list of enrolled members.

SUMMARY OF ARGUMENT (QUESTION I)

Under the doctrine of Santa Clara Pueblo v. Martinez, supra, there is no real basis in this court for a complaint against the officers and employees of the tribe and on the record before the court there is no factual basis.

ARGUMENT (QUESTION 1)

Santa Clara Pueblo v. Martinez, supra, held the federal court did not have jurisdiction to hear an action of an Indian vs. an Indian official in his individual capacity. One of the defendants was Lucario Padilla and the court concluded on page 1684 the action would not be against the tribe or its officers. Even if 42 U.S.C. § 1985 (3) afforded Petitioner a forum for an action against Respondents, which Respondent does not concede, Petitioner's petition must be denied for the reasons held in a similar suit in Chose v. McMasters, 573 F.2d 1011 (1978):

> "Local executive or administrative officials are accorded a qualified, good faith immunity from liability in damages under 42 U.S.C. § 1983. See *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Williams v. Anderson*, 562 F.2d 1081, 1101, (8th Cir. 1977); *Curry v. Gillette*, 461 F.2d 1003,1005 (6th Cir.)*cert. denied*, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 492 (1972); *Oberhelman v. Schultze*, 371 F. Supp. 1089, 1090 (D. Minn.), *aff'd mem.*, 505 F.2d 736 (8th Cir. 1974). Accordingly, the defendants herein are liable only if (1) they knew, or reasonably should have known, that their actions violated Chose's clearly established constitutional rights or (2) they took the action with malicious or impermissible motives of causing a deprivation of constitutional rights or other injury to Chose. *Wood v. Strickland, supra* at 322, 95 S. Ct. 992; *Williams v. Anderson, supra* 562 F. 2d at 1101."

Shortbull has the burden of proof to show the Respondents knew their actions would violate Petitioner's constitutional rights and further that their acts were motivated to cause a deprivation of rights to Petitioner. Petitioner's explanation of the acts of Respondents and

their motives is found in the transcript of Petitioner's Deposition of December 11, 1980, where he admits he is unable to sustain such a burden of proof as follows:

(a) Terry Matthews, pg. 69, 70, 71
(b) Marvin Amiotte, pg. 71, 72
(c) Dave Brewer, pg. 73
(d) Deloris Whitehead, pg. 74, 75
(e) Lyman Red Cloud, pg. 92
(f) Gerald Jump Big Crow, pg. 93, 94, 95, 96
(g) Ivan Bettelyoun, pg. 96, 97
(h) James Mousseau, pg. 97, 98
(i) Elijah Whirlwind Horse, pg. 97
(j) Stanley Looking Elk
(k) Edgar High Whiteman, pg. 72
(l) Gilbert Matthews, pg. 72

Therefore, there is neither a legal or factual basis for Petitioner's action.

CONCLUSION

The Petition for Writ of Certiorari of Thomas Shortbull must be denied and the decision of the Eighth Court sustained.

Respectfully submitted,

Dennis H. Hill
Costello, Porter, Hill,
Nelson, Heisterkamp & Bushnell
P.O. Box 290
Rapid City, South Dakota 57709
605-343-2410
Attorneys for Respondents